

In the
Supreme Court of the United States

October Term, 1985

FRANKLIN AND MARSHALL COLLEGE,

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

Petitioner,

v.

**EQUAL EMPLOYMENT OPPORTUNITY
 COMMISSION,**

Respondent.

**BRIEF OF ~~27~~ COLLEGES AND UNIVERSITIES
 AS AMICI CURIAE IN SUPPORT OF PETITION**

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Saint Joseph's University
Saint Vincent's College
Santa Clara College
Seton Hall University
Seton Hill College
St. Francis College (Pa.)
Susquehanna University
Texas Christian University
*Texas State Technical
Institute*

Thiel College
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University of Michigan
University of Pittsburgh
University of Scranton
Upsala College
Ursinus College
Westminster College
Widener University
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**FRANKLIN AND MARSHALL
COLLEGE,**

Petitioner.

No. 85-1439

v.

**EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
*Respondent.***

**67
BRIEF OF 66 COLLEGES AND UNIVERSITIES AS
AMICI CURIAE IN SUPPORT OF THE PETITION**

INTEREST OF THE AMICI CURIAE

Amici Curiae respectfully submit the within brief in support of the petition for a writ of certiorari, the written consent of each party having been obtained and filed with the clerk of this Court.

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Amici curiae are an ad hoc group of 66 colleges and universities representing a broad cross-section of American post-secondary educational institutions. Although this group includes institutions of varying sizes, types, and locations, each amicus is concerned because, as the Court of Appeals for the Third Circuit admitted, its decision will be the "demise" of the confidentiality of the peer review tenure selection process which has served our nation's educational institutions well throughout their history. In this case, the Third Circuit ordered that previously confidential peer-group tenure evaluation materials from throughout the institution must be made available to the EEOC in

connection with a charge that a single instructor had been discriminated against due to his French national origin.¹

The Third Circuit's 2-1 panel decision holding that the confidentiality of faculty tenure decisions is to be swept away—while refusing to balance this historic First Amendment freedom against a federal agency's request for information only loosely related to the change before it—arose at a small, private institution in Pennsylvania. Although that small college, Franklin & Marshall, has only approximately 134 faculty members and 1,900 students, the decision is making a large impact at other institutions throughout the country.

Many of the amici curiae are institutions similar in size to Franklin & Marshall. They wish to join in urging this Court to review this case because, due to their size, they could not afford to litigate alone against a governmental agency intent, even inadvertently, upon destroying the collegial nature of their institutions. These amici, similar in size to Franklin and Marshall, include Upsala College, Saint Joseph's University, King's College, Juniata College, Moravian College, Ursinus College, Lafayette College, Beaver College, Westminster College, and Muhlenberg College.

The Third Circuit's decision, however, is of equal, if not greater, concern to large institutions with many thousands of students and literally hundreds of faculty members. These amici include Rutgers, The State University of New Jersey, Pennsylvania State University, the

¹The EEOC would then be free to give the confidential materials relating to faculty members throughout the institution to the instructor who protested his denial of tenure, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981), and the confidentiality of the institution's entire tenure system would be destroyed.

University of Pittsburgh, Fairleigh Dickinson University, Widener University, and the fourteen institutions which comprise the Pennsylvania State System of Higher Education.

To these large institutions, it is apparent that the Third Circuit's ruling compelling the disclosure of all confidential tenure materials from throughout the institution for a multiple year period upon the request of a single disgruntled instructor will destroy quickly the confidentiality necessary to the operation of the tenure process. Moreover, it will create a paperwork nightmare and require hundreds of hours of response time even when the requested materials are not likely to be related to a particular tenure decision, each of which is unique.

Other amici have joined in this brief to urge this Court to review the Third Circuit's decision because the decision has raised concerns outside the confines of the Third Circuit. This decision, which conflicts with prior decisions by the Second and Seventh Circuits and which represents a major departure from related decisions by or within the Fourth, Fifth, and Ninth Circuits as well, is of nationwide importance and merits review by this Court for that reason.

Amici from outside the Third Circuit which have joined in this request that this Court review the Third Circuit's decision include the University of Arizona, Arizona State University, Northern Arizona University, New York University, the University of Michigan, Illinois State University, Northern Illinois University, Sangamon State University, Santa Clara College (California), the Texas State Technical Institute, and the nine institutions which comprise the University of California.